Appeal No. UKEAT/0168/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 21 February 2020

Before

NAOMI ELLENBOGEN QC, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

COX MOTOR GROUP LIMITED — APPELLANT

MR ANTHONY HODGSON — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	MR RAD KOHANZAD (of Counsel) INSTRUCTED BY; Peninsula Business Services Limited 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MS RACHEL LEVENE (of Counsel) INSTRUCTED BY: Slater & Gordon UK Limited 58 Mosley Street Manchester M2 3HZ

SUMMARY

PRACTICE AND PROCEDURE

DISABILITY DISCRIMINATION

1. The Tribunal's remedy judgment did not make clear that it had approached its award for personal injury on the basis that the Appellant had exacerbated an existing injury, rather than causing a new injury, and its reasons were too compressed to be *Meek*-compliant.

2. It is not sufficient for a tribunal merely to refer to a medical report which it has received; it is necessary for it expressly to identify what it has drawn and concluded from that report and how it is that those conclusions have led to the particular award made. Similarly, a bald reference to the fact that a tribunal has received evidence directly from the claimant, devoid of a summary of the salient parts of that evidence and their relationship to the particular award made, is not sufficient or, hence, *Meek*-compliant.

3. Accordingly, the matter would be remitted to the same tribunal, for it to consider afresh the award for personal injury.

DEPUTY HIGH COURT JUDGE NAOMI ELLENBOGEN QC

1. This is the Full Hearing of the single ground of appeal which has been permitted to proceed. I refer to the parties as they appeared below. Shortly expressed, the issue is whether, in its remedy judgment sent to the parties on 12 December 2018 ("the Remedy Judgment"), the Manchester Employment Tribunal (Employment Judge Hill and members) erred in its approach to the award made for psychiatric injury arising from the Respondent's failure to have made reasonable adjustments. In particular, the Respondent contends that the Tribunal failed to appreciate that it was dealing with in a case in which the relevant act of discrimination had exacerbated a pre-existing condition (depression), rather than causing a new injury. It is common ground that, as a matter of law, the Respondent should be liable only to the extent that it contributed to the relevant harm: **Thaine v London School of Economics** [2010] ICR 1422, EAT. In **BAE Systems (Operations) Ltd v Konczak** [2017] IRLR 893, CA, at paragraph 71, Underhill LJ stated:

> **"What is therefore required... is that the tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused. I would emphasise, because the distinction is easily overlooked, that the exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm. In other words, the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong; not whether it can assess the degree to which the wrong caused the harm."**

2. Before me, Ms Rachael Levene of Counsel appears for the Claimant and Mr Rad Kohanzad of Counsel for the Respondent. Ms Levene had appeared for the Claimant at the earlier liability hearing before the Employment Tribunal, but not at remedy stage. Mr Kohanzad had appeared at neither stage.

3. In its liability judgment, the Tribunal had upheld the Claimant's claims for unfair dismissal and failure to make reasonable adjustments. Claims for direct discrimination and failure to pay a bonus were dismissed. By remedy stage, all heads of compensation had been

agreed, save those for injury to feelings and personal injury. Thus, at paragraph 3 of its Reasons in the Remedy Judgment, the Tribunal stated that its reasons related to only those heads of compensation. The Tribunal awarded the sum of £14,000 for "middle band Vento" injury to feelings and £6,000 for personal injury, in each case plus interest over the relevant period, at 8% per annum. It is only the latter award which is the subject of this appeal.

4. The parties' respective submissions may be summarised briefly. The Respondent points to the Tribunal's reference to the report of Dr P Vandenabeele MD MRPsych LLM MBA, Consultant Forensic Psychiatrist, at paragraphs 13.3 and 13.5, of which he had opined:

> **"It certainly appears from [the Claimant's] medical notes that towards the middle of 2015 there had been a deterioration in his mental state with a re-emergence of depression… Based upon the information available, it appears to me that within a short period of time following his return to work in September 2016 [the Claimant's] mental health rapidly deteriorated and that he was suffering from a moderate depressive disorder with associated symptoms of anxiety (panic attacks). It is my view that the onset or causation of his illness could be understood in the context of him having a pre-existing vulnerability to stress or mental health related difficulties. The likelihood that he had not fully recovered from his depressive episode that had been present prior to September 2016, the stress of returning to work in an environment where he already felt 'victimised', the stress of recovering from significant physical health problems and the fact that at the time of his return to work in September 2016, no reasonable adjustments had been made for him resulted in him feeling more 'victimised.' On balance, it is my view that the failure to make reasonable adjustments has significantly contributed to the deterioration or worsening of his pre-existing mental health difficulties."**

5. Mr Kohanzad says that, taken together, those paragraphs suggest that the Claimant was suffering from a pre-existing condition which was exacerbated by the events of September 2016, resulting in a diagnosis of moderate depressive disorder with associated symptoms of anxiety. He contends that nothing on the face of the Remedy Judgment indicates that the Tribunal assessed personal injury on that basis. Had it done so, one would have expected to find in its Reasons an examination of the extent and duration of exacerbation, yet there is no reference to either. Mr Kohanzad speculates that that might be because the medical report had not "done a good job" in respect of those matters (and its author does not appear to have been called to give oral evidence before the Tribunal). In an exacerbation case, the Tribunal needed to make appropriate findings in order to arrive at the appropriate award. Simple incorporation of the entire medical report, by

reference, will not suffice. Acknowledging the degree of latitude accorded to a tribunal by the Employment Appeal Tribunal when analysing its Reasons, the Reasons here are inadequate, says Mr Kohanzad and the case should be remitted for assessment of the award on the correct basis.

6. On behalf of the Claimant, Ms Levene says that the Tribunal gave concise, sufficient and proportionate, **Meek**-compliant[1], reasons and applied the law correctly. In the alternative, any error of law made no material difference to the outcome.

7. "Rough and ready" as the Tribunal's approach might be considered to have been, it made plain that there was psychiatric injury (Reasons, paragraphs 16, 18, 19) and gave clear reasons explaining the award made. Those reasons, says Ms Levene, reveal that the Tribunal appreciated that this was a case of exacerbation, rather than causation of a new condition, and made clear why it was that the particular award was made:

a. At paragraph 17, the Tribunal accepted the Respondent's argument that not all of the Claimant's symptoms resulted from the Respondent's failure to have made reasonable adjustments. Thus, the Tribunal accepted that there was more than one cause of the harm in question;

b. Similarly, at paragraph 18, the Tribunal observed that non-discriminatory matters also caused the harm. Thus, it was alive to causation, as an issue, and to the fact that the injury had not been caused solely by the Respondent's failure to have made reasonable adjustments;

[1] **Meek v City of Birmingham District Council** [1987] IRLR 250, CA

c. From the Tribunal's reference, at paragraph 19, to the "benefit" that it had received from Dr Vandenabeele's "comprehensive" psychiatric report, it should be inferred that the Tribunal had accepted and adopted its contents. Section 13 of the report, supported by section 10, had made clear that the issue was one of exacerbation/deterioration and not of new injury;

d. The Claimant had, himself, sought an award of £6,000, on the basis that he had given credit for the fact that some of the harm and/or effect on his health was not found to have been the product of discrimination. The Tribunal had accepted that reasoning, thereby accepting that an existing injury had been exacerbated (Reasons, paragraphs 19 and 20);

e. The Tribunal had stated that the award fell within the bracket spanning £5,130 to £16,720. The award is at the bottom of that bracket, reinforcing the view that it was not an award for a new injury; and

f. It is to be remembered that the Claimant's pre-existing depression was already known to the Tribunal and had been recorded in its liability judgment, at paragraphs 9 and 14.

8. Ms Levene notes that there is no challenge to the legal principles applied by the Tribunal and that the Respondent accepts that aggravation of an existing injury can give rise to an award for personal injury. Further, she states that any lack of proper reasoning or clarity in the Remedy Judgment can have made no material difference to the outcome: clearer reasons would merely have set out and expressly adopted the medical evidence. There is nothing to suggest that the reasoning itself was flawed, such that a different decision would have been reached. The appeal, she says, should be dismissed.

The Tribunal's findings

9. The Tribunal's findings as to psychiatric harm or damage appear at paragraphs 16 to 20 of the Remedy Judgment, immediately below those relating to injury to feelings. They are set out, in full, below:

> **"Psychiatric harm or damage**
>
> **16. As stated, the respondent failed to make reasonable adjustments over a 15 month period, and the cumulative consequences of that failure resulted in the claimant suffering psychiatric damage**
>
> **17. We accept the respondent's argument that the symptoms the claimant experienced were as results of several aspects of the job and the eventual dismissal and consequently the claimant's symptoms were not all as a result of the failure to implement reasonable adjustments discrimination.**
>
> **18. However, we find that there was a sufficient causal link between the failure to make reasonable adjustments and the dismissal, and this was clearly set out in the judgment. Although we did not find that the actual dismissal itself amounted to direct discrimination, the circumstances leading up to the dismissal were as a result of the respondent's failure to implement reasonable adjustments. We find that psychiatric damage caused to the claimant was a result of all the circumstances surrounding the events leading up to his employment being terminated including the failure to make reasonable adjustments, and should and can be compensated.**
>
> **19. Having had the benefit of a comprehensive psychiatric report from Dr P Vandenabeele confirming the psychiatric harm caused to the claimant for the failure to make reasonable adjustments, and having heard the evidence directly from the claimant we accept the impact on his health falls within the moderate category of the Judicial Studies Board's guideline, which is £5,130 to £16,720. The claimant seeks £6,000 having given credit for the fact that some of the harm and /or effect on his health was not all found to be discriminatory and that he has since gained new employment and his mood improved. The psychiatrists also stated that they could see no reason why the claimant would not make a full recovery.**
>
> **20. We therefore consider an award of £6,000 is appropriate in these circumstances."**

Discussion and conclusions

10. For the following Reasons, I have concluded that it is not clear that the Tribunal approached its award on the basis of an exacerbated injury and that its Reasons are too compressed to be **Meek**-compliant. Accordingly, the matter must be remitted to the same Tribunal[2], for it consider afresh the award for personal injury. In so ordering, I recognise that the

[2] There is no suggestion that remission should be made to a differently constituted tribunal, or basis for any such order.

level of award made after such consideration may not, in the event, differ from that previously made, but I am unable to conclude that that will inevitably be the case.

11. It is right to note that, at paragraph 13.5 of his report, Dr Vandenabeele had expressed his opinion that the Respondent's failure to have made reasonable adjustments had significantly contributed to his pre-existing mental health difficulties. However, at paragraphs 13.6 and 13.7, he had gone on to state his view that, following the loss of his employment in December 2016, the Claimant's mental state continued to deteriorate and that, albeit with some improvement when he secured new employment, the Claimant continued to suffer from a depressive illness with comorbid panic attacks. In my judgment, it is not sufficient for a tribunal merely to refer to a medical report which it has ~~received; it~~ is necessary for it expressly to identify what it has drawn and concluded from that report and how it is that those conclusions have led to the particular award made. Similarly, a bald reference to the fact that a tribunal has received evidence directly from the Claimant, devoid of the summary of the salient parts of that evidence and their relationship to the particular award made, is not sufficient or, hence, Meek-compliant.

12. The paragraphs of the Remedy Judgment on which Ms Levene relies, in my judgment, do not salvage matters:

a. Paragraph 16 refers to the Respondent's failure to have made reasonable adjustments over a 15-month period and the Tribunal's view that such failure *"resulted in the Claimant's suffering psychiatric damage."* That statement is at least as consistent with causing a fresh injury as it is with exacerbating an existing one;

b. Whilst paragraph 17 records the Tribunal's acceptance of the Respondent's argument that not all of the Claimant's symptoms resulted from the relevant failure, there is the

incongruous further finding, at paragraph 18, "*We find that the psychiatric damage caused to the Claimant was as a result of all the circumstances surrounding the events leading up to his employment being terminated, including the failure to make reasonable adjustments, and should and can be compensated"*, which is difficult to square with Ms Levene's submission that the Remedy Judgment is to be understood in the context of the Claimant's acknowledgment, cited by the Tribunal at paragraph 19, that the award sought reflected deterioration of an existing condition. Further and in any event, having regard to the dictum of Underhill LJ in **Konczak**, cited above, the distinction made, if any, whether by the Claimant himself and/or the Tribunal, between the particular part of the injury which was due to the relevant wrong and the degree to which that wrong caused the harm in question is not apparent from paragraphs 17 to 19 of the judgment.

c. Mindful of the well-known dictum of Lord Russell of Killowen, in **Retarded Children's Aid Society v Day** [1978] ICR 437, HL: *"The function of the Employment Appeal Tribunal is to correct errors of law where one is established and identified. I think care must be taken to avoid concluding that an experienced industrial tribunal by not expressly mentioning some point or breach has overlooked it."*, I have noted that, in addressing the award for injury to feelings, the Tribunal had already referred, at paragraph 13 of the Remedy Judgment, to the Claimant's evidence that *"... his state of mind deteriorated..."* [emphasis added]. Nonetheless, nowhere does the Tribunal set out its findings as to the nature and extent of deterioration, its connection with the Respondent's failure to have made the appropriate reasonable adjustments, or how it is that that resulted in the particular sum awarded. The mere fact that that sum is at the lower end of the relevant category within the Judicial Studies Board's guidelines does not, without more, establish that the Tribunal adopted the appropriate approach and I

note that the highest that Ms Levene put her submission, in her skeleton argument, was that the level of award "reinforces" the view that this was not an award for a new injury.

13. Paragraphs 9 and 14 of the liability judgment are set out, in full, immediately below and take matters no further:

> **"9. The Claimant suffers from sciatica, arthritis, hearing loss and depression and is disabled for the purpose of the Equality Act. The Respondent accepted that the Clamant satisfied the definition of disability for the purpose of the Act.**
>
> **…**
>
> **14. in 2015 the Claimant had a hearing test that showed that he had 13% hearing loss and tinnitus. The Claimant informed his employer that this affected his ability to diagnose problems with vehicles particularly if there was background noise or it was raining. The Claimant also had a number of other health conditions including depression, back and neck pain."**

14. It follows that it cannot be said that the Tribunal adequately (a) summarised its basic factual conclusions in relation to personal injury and/or (b) stated the reasons which led it to reach its conclusions on the facts as found, such that the parties could understand why the particular award in question had been made and that the award reflected no more than the extent of the Respondent's contribution (through the relevant discriminatory acts) to the exacerbated injury in question. I cannot, safely, conclude that, had it made and set out all appropriate and necessary findings of fact and its rationale, the outcome would have been the same.

15. Subject to the following paragraph, on remission of the matter for that purpose in accordance with this Judgment, it will be for the Tribunal to determine whether it will be necessary for it to receive further evidence.

16. Ms Levene has noted the modest nature of the Tribunal's award for personal injury in this case. Whilst I have not found that the level of award is such as to render the Tribunal's reasons

A adequate to explain its approach and conclusions, I encourage the parties to seek to resolve this matter by agreement, if possible.

B

C

D

E

F

G

H